No. 2251

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MATSON NAVIGATION COMPANY
(a corporation),
Appellant,

vs.

UNITED ENGINEERING WORKS
(a corporation),
Appellee.

ADDITIONAL BRIEF FOR APPELLEE.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Appellee.

Filed this .....*day of January, 1914.*

FRANK D. MONCKTON, Clerk.

By .....*Deputy Clerk.*

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ADDITIONAL BRIEF FOR APPELLEE.

In our original brief, we had occasion to comment upon some acts on the part of appellant of a questionable nature. We also had occasion to comment upon the manner in which testimony was presented to this Court, as unfair.

These matters are unexplained and unexplainable.

Appellant, therefore, attempts to minimize them and assumes the position of virtuous humility, under what he is pleased to term "personalities", hoping thereby

to induce the Court to refuse to give weight or consideration to the said incidents. For our own part, we have no taste for personalities, but when they are so involved in the facts of a case as to give character to those facts, they are as necessary to be considered as any other elements in a case. If our suggestions are not justified by the record they are unworthy of us, but, if justified by the record, no "ducking" or plea that such conduct is unethical, will answer the purpose. We justify our present conduct by observing that it is in accord with the instruction we received from a man whose ethics at this bar were unchallenged for more than a generation, and under whose careful and friendly eye we received our training. Under the facts of this case any other course would prove us unworthy of our calling.

That appellant has not hesitated to make personal attacks, covert and otherwise, when it suited his purpose, is shown, not only by the brief, but by the entire record of the trial, and he only disparages such conduct when the record is so clearly against him, that he has no other recourse. In this connection we now specifically call attention to the charge respecting

DAVE DOIG'S TIME CARDS.

That he should catch at a straw in an attempt to brand us with his own peculiar failing, does not surprise us, but the very means he adopts for this purpose, only serve to strengthen our criticism of his methods for which, in other connections, we have taken him to task.

In connection with DAVE DOIG'S TIME CARDS, he makes a personal attack upon counsel, it being directly charged that we surreptitiously slipped that exhibit into the record without having produced it regularly at the hearing for that purpose.

At the argument, we were taken by surprise, and of course had not the time to examine the voluminous record so as to refute the charge. We did, however, call the Court's attention to the fact that the cards were properly endorsed, and promised to point out the volume and page of the record where these cards were introduced.

In order to avoid the evidentiary effect of the *endorsement* of the cards, as proving the regularity of their admission, appellant now states that we "rested upon the assertion that the propriety of the cards as part of the record, was made manifest through the *'clerk's' endorsement* found on their back" (reply brief, p. 115). He then devotes a whole page (116) to show that the *clerk's or commissioner's* endorsement is not such evidence, because, when "in the course of a witness' examination exhibits were offered by either

party, the then acting *stenographer* would place upon such its appropriate mark or designation."

We do not recall having used the word "clerk's" endorsement, at the hearing. But whether we did or not, we then knew, as well as appellant knew, that it was the stenographer's (Mr. Clement Bennett's) endorsement, that verified the exhibits, and *it is his endorsement which the exhibit in fact bears.* Had counsel not been blinded by his hot-footed desire to charge us with an attempted fraud upon the Court, he would have looked at the endorsement on the card before committing himself to the distinction between the "clerk's" endorsement and the "stenographer's" endorsement. Had he done so, he would have been convinced that the endorsement was in the stenographer's handwriting, and not in the clerk's. The slightest comparison of that endorsement with the other endorsements on the exhibits, would have confirmed this.

But, now, with reference to the record. It is said (reply brief, p. 117):

> "As counsel does not contend that their presence in the record is a mistake or an inadvertence, the only alternative left is to await his showing of the volume and page of the record where these cards were introduced. At the close of the oral argument this was what counsel told the Court he would do, and we shall await with interest his performance in that respect."

Look at Vol. IV, p. 1416, where the following appears:

> "Mr. FRANK. We also offer the cards of Mr. Dave Doig, on which he was examined and ask that they be marked Dave Doig Exhibit No. 1.
>
> Mr. MCCLANAHAN. I object to the offer of the cards on the ground that they are incompetent, irrelevant and immaterial, hearsay, self-serving and not binding on the respondent, and ask that my objection apply to each card and every card introduced in the exhibit. (The cards are marked 'Dave Doig Exhibit No. 1.')"

Again his hot-footed pursuit of his quarry has made him blind to the record.

So far as the legal effect of Dave Doig's cards as evidence is concerned, we have made our position plain in the original brief, but we shall have something further to say on that subject at the end of this additional brief.

After reading the reply brief, we find nothing that requires our attention save the correction of statements concerning the state of the testimony and of criticisms of our statement of facts, more or less of the nature of the "Dave Doig" attack, which criticisms are a running comment upon sentences in many cases disassociated from the context.

THE HOUGH INCIDENT.

The treatment of this incident in the reply brief is specious.

We note with pleasure, and heartily indorse, appellant's suggestion regarding "any attorney who would lend himself to such conduct." We also note the statement that, at the time of the trial our probing into the matter was looked upon as

> "being on a par with the tactics of some practitioners in the handling of a jury trial where the incident, admittedly having no bearing on the merits of the case, is elucidated for the purpose of the effect on the mind of some possible man in the jury box. Had we known or suspected that it was going to be used in this case as the basis of a charge of a species of bribery, we certainly would have gone into the matter further by calling Mr. Diericx for substantiation of our understanding of Mr. Hough's retainer," etc.

As to the suggestion that our unfolding this matter is "on a par with the practice of some practitioners in the handling of a jury trial", we have only to point out its use in another connection in the same brief. That use in the two instances is so identical as to make it patent that it is a favorite suggestion with appellant when he is unable otherwise to explain questionable conduct or a bad situation in which he finds himself. But it will not answer in this case. Our long experience with and intimate knowledge of the judges of both Courts is sufficient to make certain that we never dreamed of being able to influence any of them by improper or immaterial issues.

But is such conduct immaterial? It has been urged by appellant, that there are presumptions arising against the United for failure to call a witness which the Matson Company claim we should have called. If such presumption arises from a passive act, are there no presumptions arising from an active attempt to suppress testimony—leaving out of question the admitted criminality of such an act?

And what are we to say of the statement that it was not suspected that the fact "was going to be used in this case as the basis of a charge of a species of bribery," *as an excuse for not calling a witness constantly at their elbow (Diericx) who would undoubtedly have attempted to refute the charge, had he dared to take the stand?*

The attempt to minimize the nature of the testimony of Mr. Hough upon this subject by the quotations from his testimony set forth in appellant's additional brief, can find little favor in the face of the direct and conclusive statement of the witness under cross-examination. The substance of his testimony, without qualification, is, that Mr. Diericx applied to him to make an estimate, and that he told Mr. Diericx that such an estimate would be of no value; that it is unsatisfactory; that it is improbable that any one, making an estimate upon repair work that they had not seen, would arrive at correct values unless by guess, and this he declined to do. That *the next day*

> "Mr. Diericx asked me, I think, *if I could serve to the extent of not serving the United Engineer-*

> *ing Works,*—I will not be sure of his words, and I do not wish to misquote him,—and *to that extent I would be neutral.*"

Again:

> "As I said before, my neutrality would be to that extent where I would not serve the United Engineering Works (p. 1380)."

We do not desire to encumber this brief with extended quotations upon this subject. We have made references in our original brief to the pages of the testimony, and we have no doubt the Court will read the entire examination and draw its conclusion from it as an entirety. After so reading it, it does not appear to us that any one can conclude that appellant did not suspect the nature of the charge we were making, or the use that would be made thereof. Pages 15 and 16 of our original brief sufficiently indicate the application we desire to make of that testimony, and in that connection, we deem it decidedly material.

The suggestion that the charge is puerile, because "the merest embryo would know it to be impossible for the expert to remain bought because of the power of the process of this Court," is no answer at all. Not only do persons who engage in such transactions overlook the possibilities, but they also count upon the great improbability of the transactions being discovered.

NINE HOURS SHOP WORK, WHEN 8½ WERE ACTUALLY PERFORMED (Brief p. 71).

Appellant takes exception to our statement that his treatment of this matter is unfair, and tries again to make a distinction between the actual cost of doing the work, and the reasonable value of the work, which necessarily must include the contractor's profit, and contends that the *billing rate* carries a profit. He justifies his use of the billing rate because Gardner says it was a good liberal rate over and above cost and carried a good profit with it. He does not, however, refer to the fact, so thoroughly established by the testimony, that the billing rate only applies to the number of hours as charged *in the bill,* which are *greater* than the actual hours, just because the billing rate is *less* than the true rate. In other words, he still insists upon applying a lowered rate to the actual number of hours worked, instead of the true rate for these actual hours. Mr. Gardner's testimony upon this subject is of no value when considered in connection, not only with his bias, but also in connection with the testimony of every other witness showing that the billing rate is below the true rate.

A repetition of his former contention does not prove it to be fair.

The same applies to his criticism of our answer to his claim respecting overtime.

WRONG FIGURES ON OVERTIME.

What fatuity in this connection leads him to paraphrase our argument, "to illustrate the *true* situation" in the following language (Reply Brief, p. 73):

"In other words, respondent is billed for 10 hours' time at 65¢ an hour, which equals $6.50. If, however, the *rate* had been doubled, instead of the *time,* the charge would appear thus:

9 hours at 65¢ = $6.50, and
½ hour at 1.30 = .65, which

being added together = *$7.15''.*

His arithmetic is very bad indeed, for,

9 hours at 65¢ = $5.85
½ hour at 1.30 = .65, which

being added together = *$6.50,*

the same as the billed charge of 10 hours at 65¢.

Can we be blamed for losing patience with one who is continually criticising our statements as inaccurate, and basing his criticisms upon just that kind of verification?

THE CRANK-SHAFT CONTROVERSY, AND CHANGE MADE IN THE REPORT OF THE EXPERTS TO CONFORM TO THE NEW THEORY (Reply Brief, pp. 31-35).

We do not appreciate appellant's answer *"from a legal standpoint"* "that would put an end to the entire contention on the subject".

With regard to the balance of the matter under this heading, we are content to allow it to rest upon what appears in the record and our original brief, and if appellant feels that his explanation destroys the force of our argument under that heading, we will not quarrel with him.

We are only sorry that we cannot agree with him concerning the motive for this change. It does not stand alone upon the record, but receives character from other incidents of a similar nature, to which we have called attention. Since it was open to explanation by both Diericx and Gardner, the *ex parte* statement that they were not called because "on second thought it seemed really an immaterial matter of no consequence as determinative of the issues involved", seems scarcely sufficient to fill the requirements.

How like this excuse is to the excuse for the "Hough incident"!

What transpired between counsel upon this subject is fully set forth in the record, and the colloquy there referred to was of so little importance that the reporter merely noted it, instead of transcribing it.

DISCREPANCIES IN THE SEVERAL SPECIFICATION EXHIBITS.

In criticising our statement that the only specifications that the executive officers of the United had was the respondent's Christy "C", appellant confines himself to the testimony of Mr. Christy, who is not one of the executive officers of the United, but whose work is confined to the management of the mechanical end of the work. He also introduced colloquies between counsel upon the subject in which it is admitted by counsel for United that the set of specifications then before the parties came from the United's records; that he had produced what counsel for Matson had asked for, to the best of his knowledge, and had produced all the papers that he knew anything about relative to that matter. When pressed for an admission that it was the original, counsel for the United refuses to make such admission, because not advised upon the subject.

Appellant then asks (reply brief, p. 42):

> "With this evidence in view, how can counsel have the temerity to say: *'The only specifications that the executive officers of the United had was respondent's Exhibit Christy C'.*
>
> * * * * * * *
>
> "Where in all the record is to be found one word to substantiate the portion of the sentence which we have italicized?"

Why does appellant not include in his resumé the testimony of Harry Paul Gray, *who was the man who received the specifications and made the bid, and who was not present at the time of the colloquy,* but was called on May 1, 1912. (The date is found on p. 2285,

Vol. VI, and the testimony which we shall refer to is found on p. 2249, Vol. VI. The colloquy referred to took place on September 20, 1911; the date is found on p. 1227, the colloquy on pp. 1267-68.)

On page 1266 Mr. Christy says:

> "A. I have just told you, I am not in touch with the conditions prevailing with the office records on this side.
>
> Q. So you don't know?
>
> A. I don't know what the city office records are."

Mr. Gray then testifies as follows (p. 2349):

> "Q. I show you now respondent's Exhibit Christy 'C', and ask you whether or not that is the set of specifications that was given to you?
>
> A. Here is the office mark on the thing; that is the only specification that I know anything about.
>
> Q. That is the only specification you ever saw?
>
> A. That I know anything about or that I ever saw. These things go to the office, then they go to me."

Does this warrant the charge of temerity on the part of counsel, in stating that the only specifications that the executive officers of the United had was the Respondent's Exhibit Christy "C".

So, too, with our statement that the specifications, which are presented to the experts, and under which their work is done, is Respondent's Exhibit Saunders No. 1.

We are criticised for the statement that their work was done under those specifications. In the reply brief it is said that

"counsel must know that our experts did no work on the specifications. He must know that the work was done under an itemized heading of appellee's own bill, schedule 1, which is reproduced in Kinsman's Exhibit No. 2" (p. 43).

What, then, will we do with the following examination of his experts by appellant:

"Q. Aside from assuming, Mr. Gardner, that 'Respondent Kinsman Exhibit No. 2' is a copy of Schedule 1 in the first 3 pages, you may assume in the further course of your examination, that the paper which I now hand you entitled, *'Respondent Saunders Exhibit No. 1' is a copy of specifications prepared by the respondent in this case and submitted for bids to the United Engineering Works, the libelant, etc.*" (Vol. VI, p. 2206).

And again, on page 2215:

"Q. Now, Mr. Gardner, calling your attention to *'Saunders Exhibit 1', which is the original contract* I have spoken of in my assumptions, do you remember that I asked you to assume that there was certain work changed in that specification, which we have called compensation work? Will you please go over that schedule and tell me if you know whether the second item of specification was performed or not? Read the whole paper to yourself, and answer yes or no.

A. From the information we gathered aboard the ship, we found that this work was not done.

* * * * * * *

Q. What was the work done instead of that?

A. There was a counter-balance cylinder made and installed, which we saw. The valve-stem was lengthened for the purpose of connecting with the piston in this counter-balance cylinder, which we did not see, but it was thoroughly described to us, and the necessary piping we saw, which was used in connecting up this cylinder.

Q. I will ask you if the fourth item of specification was changed?

A. The high pressure and intermediate shoes were not reconstructed, but new shoes were cast and fitted to place.

Q. Examine the fifth item of the specification and answer the same question."

To which he gives answer.

Again:

"Q. Please examine the seventh item, and answer the same question."

To which he gives answer:

Again:

"Q. Examine the fourteenth item and answer the same question."

Again:

"Q. Did you have any information, Mr. Gardner, at the time of first visiting the 'Hilonian' of these changes in the original specifications?

A. Yes, sir, I think I had, and I think my testimony relative to what was furnished me at that time should be corrected in that as I now recall it, *this was also furnished me, a copy of this specification.*"

Again, speaking of item No. 1 in Kinsman's No. 2:

"Q. That is, you consider that it does not belong to any of the specification items, or any of the minor schedules of the libel?

A. I am not so sure about it not being one of the schedules. (After examination.) It is not connected with any of the schedules.

Q. Nor does it form part of any of the specification items?

A. It does not form part of any of the specification items. To the best of my recollection now, it was the subject of a contract, or a letter at least. I do not know if it was a contract,"——

And so on, through his entire testimony, he compares the items set forth in Kinsman's Exhibit 2 with the specifications in Saunders' No. 1, and testifies as to whether he considered it as coming under the terms of said specifications, or whether he considered it an extra. So, on page 2226, speaking of items six and seven of Kinsman's No. 2, he said he did not consider it entirely an extra, in that the work would be necessary on account of repairs recommended in item No. 1 of the original specifications, and on account of a contract for the installation of a new circulator, said contract having been awarded to the United Engineering Works prior to the main part of the repairs in "Respondent Saunders' Exhibit No. 1".

And finally, when the question arose as to the difference between Saunders' No. 1 and Christy "C", to which we call attention in our brief, the witness apprehending the difficulty, comes to the rescue with the general statement that an assembling clause would be presumed, even though not stated in the specifications (pp. 2229-30).

So, too, with Heynemann (p. 2019). He is asked:

"Q. Mr. Heynemann, in the course of your examination you may assume that this document which I hand you, which is marked 'Respondent Kinsman Exhibit No. 2', is a copy of the first three pages of Schedule 1 attached to the libel. *You may also assume that the paper I now hand*

you marked 'Respondent Saunders Exhibit No. 1', is a copy of specifications prepared by the respondent in this case and submitted for bids to the United Engineering Works, the libelant," etc.

He is then examined, as well as Gardner, upon the two papers, relying on the specifications to determine whether or not with respect to any particular item under Kinsman's No. 2, he would figure upon it as an extra, or would place it under the specifications for which he allowed only the specification price.

It is also noteworthy that appellant makes no answer to the fact that "Christy C" is identical with the copy of the specifications *set up in the answer* as Exhibit 1 (Record, p. 52).

That they charged us with the extra matters called for in the final clause of Saunders No. 1, which is not called for in Christy "C", is apparent.

Which one of our respective statements, then, is the more accurate?

CRITICISM OF OUR CLAIM THAT THE PLEADINGS ADMIT THAT OMISSIONS, CHANGES AND MODIFICATIONS WERE MADE WITHOUT AN AGREEMENT BETWEEN THE PARTIES AS TO VALUE OF THE CHANGES, OMISSIONS AND MODIFICATIONS.

Appellant now desires to limit this admission in the answer as referring "solely to the crank-shaft."

In order to substantiate this contention, he makes a quotation from his answer (p. 48) and interpolates therein an important statement of fact that is not contained in the answer. He quotes his allegation as follows (the italics are ours):

> "That respondent is informed and believes, etc., that the just and reasonable value of the work and materials omitted as aforesaid by agreement of the parties from the original contract, as aforesaid, is the sum of $1398.25, and of the additional work and materials *(not called for by the contract)* furnished as aforesaid, the sum of $8280.50."

The language above quoted, *"not called for by the contract"*, is an interpolation not contained in the answer, and without this interpolation, the construction he now attempts to place upon his answer cannot properly be made.

The allegation which refers to *omissions from* and *additions to,* "the original contract" is in a single sentence, viz.: "materials omitted as aforesaid by agreement of the parties *from the original contract as aforesaid,* is the sum of $1398.25, and of the additional work and materials furnished as aforesaid, the sum of $8280.50." The relation of both of these statements to the language "original contract", is so intimate that no

one reading it would suspect that the last valuation was intended to apply to work and materials *"not* called for by the contract."

We do not wish in this connection to suggest that appellant has wilfully made this misquotation with the intent to deceive, though it would most likely have that effect if attention were not called to it. We think it was placed in there to emphasize the construction he desires to place on the language.

That that construction is not legitimate, is further emphasized by the fact that the valuations contained in the allegation are of two kinds, one for *omissions* and the other for *additions* (additional work and materials). Now, the principal allegation concerning the matters that were done "without an agreement between the parties as to value," refers not only to omissions, but to "omissions, *changes and modifications"*. As the $1398.25 in the allegation now under consideration, only refers to the "value of the work and materials *omitted",* what becomes of the value of the additional work and materials rendered necessary by those *"changes and modifications?"* That there was such additional work and materials, is admitted in the record, even under their contention for "substitution work". As pointed out in our original brief, there was "more expensive work" for which Klitgaard said the respondent was to pay "in addition to the contract", while with respect to the crank-shaft there is no testimony showing that there was any *additional* expense, but only a *saving.* This matter is fully pointed out in our original brief (pp. 30-31).

It is also to be noted, and is admitted in this additional brief (p. 20), that, in the answer, appellant *makes no express mention of the compensation and substituted work.* If that were his contention, it should have appeared in the answer. It is a settled rule of law that pleadings are to be construed against the pleader. Certainly it will not do to mislead the appellee, by an allegation which fairly covers all the "omissions, changes and modifications"—*those which were known to have been made in other items of the specification as well as in the crank-shaft item,* and which were the chief subject of contention in the litigation, without a fair statement of the case intended to be made. The attempt now to place a more favorable construction upon his pleadings by *ex parte statements outside of the record as to how the pleading was made up,* will not answer the purpose. The case to be tried was made up by the pleadings, and not by anything that rested in the inner consciousness of the parties. The fact that appellant now finds it necessary to interpolate in his brief, language not contained in the pleading, in order to fix his construction upon that pleading, is conclusive of the fact that without such interpolation, the construction he now desires, could not fairly be placed upon it.

VALUE OF MODIFICATIONS NOT AGREED ON.

We see no necessity of considering the suggestions made in the new brief under this head, except that portion which attempts to develop a new theory respecting the consolidation of the numbers. The rest of it is fully covered in our original brief.

AN "ELEVENTH HOUR" THEORY AS TO CONSOLIDATION OF NUMBERS.

Appellant now says (brief, p. 29):

> "Since writing our opening brief we have become convinced that our interpretation of Curtis' testimony on this point, as found on page 171, is incorrect. This witness' consolidation order, we now contend, was not one which affected the time and material card record *of the men,* but one which affected the final sheets of the *foremen* showing the completed work, from which sheets he, Curtis, compiled his bill-heading."

There is some satisfaction in knowing that appellant has again been compelled to change his position, even though it be at the last moment, but the new position is not supported by the evidence. Like many other points made by appellant it is an attempt to put a construction upon the testimony by wresting a few words from their context. The context, however (pp. 1462-63-64), shows that this new suggestion is absolutely without foundation. For instance:

> "But in the case of the 'Hilonian', the changes became so numerous that it would be impossible to give every change a number, so then the work was considered collectively, that is the job was run collectively under the numbers as mentioned in Exhibit 1."

Q. Then does 5295 contain work not included in the original list of 5295?

A. 5295 includes a great deal more work than what was set forth in the original list that was put under the number of 5295.

Q. How does that occur?

A. In this way: When I went over to the yard, as it is my duty, I go through the different departments. The foremen stated to me there were numerous changes being made from the lists which they had. They said that there were a number of numbers placed to cover these changes. I explained to them at the time that that was under my orders. Then they stated that the changes were becoming so numerous that if I wanted to keep track of all these changes I would have to put in a great many numbers, so in order to simplify that I instructed the foreman of every department to use the numbers on the job collectively and to note on their sheets the work as they actually performed it. * * *

Q. As the result of this, what I wish to develop is whether or not 5295 *contains work different from the original lists and many changes not noted.*

A. *Yes, sir, it does.*

Q. Were some of these changes great deviations?

A. Yes, sir, there were many of the changes great deviations because they were brought to my *attention at that time.*

Q. Would it be possible at this date to segregate those changes?

A. No, sir, it would not. They could not be segregated.

Q. You did, however, segregate part of them under the bill as you have testified to, of Exhibit No. 4. How did you do that?

A. That was a change that was performed on 5295, and I was informed that a price has been given for that work. Immediately on this infor-

mation, *and as the work was progressing,* I went over there and called on the men that performed this part of the work and *were performing it,* and the foremen of their different departments, and took *those cards containing the labor* and the material containing these parts *out of 5295.*

Q. You did that *at the time the work was progressing?*

A. Yes, sir.

Q. And had the pieces before you?

A. Yes, sir, they were in the shop.''

This shows conclusively that the changes were made as the work progressed, and without a new number, but on the cards of the men were placed under No. 5295, and that in one instance, in order to segregate such changes from No. 5295, he went to the yard and called the men that were performing the work, together with their foremen, *''and took those cards containing the labor and material containing these parts out of 5295''.*

This was done by having the pieces before him at the time.

The instruction to the foreman of every department to use the numbers on the job collectively, was only a medium through which those numbers were passed to the men to be used on the job collectively, because the testimony is undisputed that the men got their job numbers from their foremen (p. .....), and if the foreman was using them collectively they would of necessity appear upon the men's cards collectively.

So, too, with appellant's quotation of testimony from Vol. V, pp. 1587-1589. He has left out the por-

tion which disagrees with his new theory. Let us transcribe the whole testimony:

"Q. Now, Mr. Curtis, you have said that the labor and material found on Schedule 1 was furnished under certain numbers that you gave?

A. Yes, sir.

Q. That is correct, is it?

A. Yes, sir.

Q. And that in making out Schedule 1 you discarded these numbers and consolidated all the work and material under that schedule, without giving it a number?

A. I did not discard the numbers. I used those numbers collectively. I used that as a serial number for that, and consolidated all the work done under these numbers in Schedule 1.

Q. You used what is a serial number?

A. These numbers that I gave were on Schedule 1 collectively.

Q. You discarded all those numbers in framing your bill. You did not put any of them on your bill?

A. No, sir; because they were on Mr. Putzar's sheets.

Q. What was your reason for doing that?

A. My reason for doing that was that there were so many changes and interchanges that conflicted one with the other with pieces that were changed and rechanged, machined and remachined to suit different conditions that arose that it was impossible to segregate and keep a segregation in work under a number, for the reason there were so many changes occurring. It would take a great number of numbers to keep track of it.

Q. These several numbers which were consolidated in Schedule 1 were placed on the lists of work to be performed by you, were they?

A. They were, yes.

Q. And during the progress of the work the workmen placed those respective numbers on their time cards, did they not?

A. They did.

Q. As they did work under that particular list, did they not?

A. Yes, sir.

Q. What was the difficulty, then, that you found in taking Mr. Putzar's time-sheets with these several numbers attached to the work? What was your difficulty in still maintaining those numbers separate and distinct?

A. The numbers were used collectively on the job; that is, the *man who had that department number used that department number*——

Q. Excuse me. What department number do you refer to?

A. I mean the number that was *given to the man by the foreman. He uses that number regardless of what change was made* on the order that was issued for that number. *That is, he keeps track of those changes under that order, and kept his time under that number.*''

Does that testimony warrant the contention that the men had separate numbers for these changes on their cards, which were only consolidated by the foreman or by Mr. Curtis in his bill-head? Is it not absolutely plain that when the witness spoke of numbers being used collectively on the job, that he meant that the number was given to the men by the foremen, and that the men used that number regardless of what change was made in the order,—that he keeps track of those changes under that order, and kept his time under that number?

Again (p. 1597), in speaking of keeping a separate number for changes in the smoke-stack, the witness says:

> "A. As I told you before, the changes were becoming so great and extensive and so many of them, and some of them large and some of them small, that in order to simplify matters *we did not put in any more numbers.*"

See, also, continuing on page 1598.

That libelant attempts to gainsay this fact, is natural, because it is the underlying fact that gave rise to the dispute and character to the litigation. It is neither "beside the issue", nor is it false, nor is it improperly suggested or unfair, nor is it in the nature of an "undignified appeal to jurors." A man's nature and disposition are often more lucid explanation of his acts than are his direct statements concerning the same. So well understand is this, that in all departments of science the announcement of new discoveries, or new theories, by the very best of scientists, is always carefully weighed by what is known of their personal equation,—so far is this from an appeal to passion or prejudice, and so thoroughly in accord is it with the methods of the calm, cool judgment of an exact science.

The statements made are true. Not only is it Mr. Heyneman's judgment of the man, which judgment as it appears in the record was not attempted to be gainsaid, but the fact is so unmistakably evidenced in the testimony of Captain Matson as to defy contradiction. The witness does not need to be "seen" "in giving his testimony", for it does not lie in the physical manner of his testifying alone, but is innate in the language of the testimony itself.

CRITICISM OF OUR STATEMENT RESPECTING 10 YEARS OF AMICABLE RELATIONS.

It is said this stateemnt is contradicted by the gratuitous statement of our own witness, that he had one "big row" with the Matson Navigation Co. over a ship.

Instead of being a contradiction, this is a confirmation of our contention, for *that* "big row" was amicably adjusted, and this only goes to prove that *this* "big row" might also have been amicably adjusted if the Matson Company had approached the question in a spirit of fairness.

But it is said that they *did* approach it in such spirit, because Mr. Diericx proposed to pay the bill "at a compromise figure". However, there is nothing to show how that was made, or what that proposal was. Their original offer was something over $15,000. After the controversy had arrived at the point of litigation, the Matson Company concluded that it actually owed not less than something over $22,000. Offering to pay very much less than is claimed to be due, is approaching the matter in a very different spirit from that suggested by the United, namely, to sit down together and check the amount up, not for the "purpose of a compromise", but for the *purpose of ascertaining to the satisfaction of both parties what was actually due.*

REFUSAL TO CHECK UP APPELLEE'S BILL BOTH BEFORE AND AFTER SUIT.

It is suggested that the first offer to check up the bill before suit was only "for any clerical errors". That is rather a narrow construction to place upon the testimony of the witness, when it nowhere appears that the *refusal* to check up the bill was based on the ground that the offer was only for "clerical errors". Appellant ignores the other statement of the witness, cited in our original brief, that "the bill was never gone over nor checked up with anybody interested in the steamer *as regards time. That is usually done*". Having in view the long course of dealing between these parties preceding this dispute, and this testimony regarding the usual method of checking up the bill, it cannot fairly be presumed that the Matson Navigation Company understood the offer to check up to be limited in the manner now suggested.

So, too, with the offer to check up after suit brought.

The quotation in appellant's brief (p. 14), with its italics, is characteristic of the treatment of this whole case. He says:

> "We find such offer couched in these words: '*Now, if there is any portion of this bill that you are ready to concede,* so that we can prove that which you contest, why, I would be very glad to cut down the entire examination.' "

Stopping at that point of his quotation will not answer for a true statement of the offer then made,

for he has left out the very material statement immediately following, which is as follows:

> "I will say now that Mr. Diericx was invited to go over these details and check up this entire work in its detail, which you declined to do, and *if you will check it up with us now we can do it now.*" (R. Vol. 1, p. 166.)

If this was not an offer to check up the entire work in its detail, then and there, we do not know the meaning of the English language, and the fact that appellant has omitted it in his reply brief shows that he so understood it. But to have quoted the entire sentence would have made entirely nugatory his attempted argument that counsel for the United was "oblivious of the fact that we had already admitted the minor contracts of the libel", etc.

His alleged admissions do not meet the issue. And so, too, his "admitting the rates of labor on appellee's bill to be correct" was, as pointed out in our original brief, no admission at all, because those rates of labor were known by both parties, not to apply to the reduced hours of labor contended for by appellant.

APPELLANT'S CHARGES OF COLLUSION AND FRAUD.

That both the record in the case, as well as appellant's brief, are replete with such charges, both direct and by inferences more potent in their nature than direct charges, cannot be gainsaid. The fact that appellant now, after having permeated the entire record with such suggestions, is compelled to practically withdraw them with the statement that "We do not ask the Court to follow counsel in these inferences" is a qualified acknowledgment of the injustice of the position taken by him, but it does not relieve the situation. If we have been acting fairly, and not attempting to take advantage of the appellant in this transaction, then every excuse for this litigation on the part of the appellant drops from under him. The charges of collusion and fraud, and that alone, are the foundation of this litigation. That we did the work, is not denied. That we did it conscientiously, cannot be denied, and that throughout there is no indication of a desire to incur unreasonable or improper cost, cannot be denied; and if appellant had approached the subject in the same spirit, there would have been no controversy. But that appellant is attempting to secure something not its due, because of its appreciation of the fact that technical proof of the details of this work is exceedingly difficult, is the one glaring fact standing out prominently both upon the record and in the argument.

PUTZAR'S POSITION IN HIS RELATION TO THE PARTIES.

So also we are pleased to find that appellant now emphatically denies that he makes any attack upon Putzar's integrity and reputation (reply brief, p. 75).

That no man can read his original brief, or the record at the trial and fail to appreciate that such attack was made, is plain. People do not, as a rule, charge a man with a wilful failure to keep the record for which alone he was employed, and accepting the record of the party against whom he is employed to check; nor do they charge him with assuming the duties of supplying additional work for the advantage of the builder; nor do they charge him with making agreements with the builder for the recognition of extra hours not worked for, against the interests of his employer, and unauthorized by his employer; nor do they charge him with "covertly" negotiating with libelant and settling the days' time on the ship; nor do they charge him with withholding his independent record and going to the builder for his record to be supplied to his employer, when his independent record is called for; nor do they charge him with doing the "trick" by the allowance of double time, copied from the builder's records, and signing the sheet; nor do they charge him with passing over to the builder his record which it is claimed "was the sole property" of his employer; nor do they charge him with approving, as an appropriate charge against his employer, charges that should not be so charged and characterize such acts as "fraudulent collusion"; nor do they charge him with wilfully with-

holding his records from his employer; nor do they suggest that when he has found himself in difficulty with the incomplete record, that it would "have been the proper and appropriate thing for him to have asked assistance from his employer, and not from the other side"; nor do they "make bold to further assert" that like "the seventh son of a prophet" they can read between the lines, and come to the conclusion that the man has secured from the builder the material for the report to his employer, because he himself had not the material, and to that extent was deceiving his employer; nor when directly asked whether or not they would undertake to say that he was not a man whose reputation among all people who have dealt with him was that of the very highest integrity, reply, "I refuse to answer that question" (Rec. p. 1698), nor, generally, would they prefer such a contention as is contained between pages 73 and 122 of the original brief, if they were not making an attack upon the man's integrity.

The suggestion that we are making a personal attack upon appellant by our characterization of those insinuations and inuendoes will not answer, while the pathetic position of "remaining mute", may perhaps be the only means of disposing of an unanswerable fact.

CRITICISM OF OUR STATEMENT THAT AS THE WORK PROGRESSED THE SPECIFICATIONS WOULD NOT ANSWER THE PURPOSE, AND AFTER PREPARATION HAD BEEN MADE, AND PARTS OF THE VESSEL TORN OUT, PART OF THE WORK HAD TO BE ABANDONED AND OTHER WORK SUBSTITUTED.

Appellant comments upon our justifying this statement with the testimony of Siverson (pp. 1090-3).

On page 46 of our original brief the same subject-matter is treated, and reference there made to Siverson, Vol. III, pp. 1089-1096, and Taylor, Vol. III, p. 1085; also on pages 6 and 7 of our brief, instances are given with references to Vol. VII, pp. 2354, 2355 and 2417, to Vol. III, p. 1098. These references are ignored by appellant in his present criticism.

We now further call attention upon this subject to Vol. IV, pp. 1137-1144.

Appellant in this criticism also ignores the numerous changes made in the specifications in what he calls "substituted work".

Was not every particle of this work found and determined upon after the work had proceeded along the lines laid out in the specifications? What about the patch substituted for the column? Was it not agreed upon after the engine had been dismantled and preparation made for the column? What about the crank-shaft? Was not the work on that changed after the work had progressed along the original lines? And in like manner we might go on referring to each of the changes in the specifications which appellant claims as "substituted work".

The testimony appellant cites to show that the specifications were being followed does not in anywise aid his contention—that Siverson says the specifications were consulted and when any particular line of work called for by the specifications came up, the opinion of Klitgaard and Putzar would be taken regarding the manner in which they wanted it done, and it was done in that way. Done in what way? In the way called for by the specifications, or in the way desired by Putzar and Klitgaard? The entire record shows that the way of Putzar and Klitgaard consisted of repeated deviations from the specifications, amounting to a large amount of what appellant calls "Substituted work". That we were referring to these changes, in the statement which appellant now criticises, is made plain by the fact that in direct connection with said statement, we proceed as follows:

> "It is the contention of the Matson Company that these changes were agreed upon as substitutes, without further charge, between Klitgaard for the Matson Company, and, in some instances Wilhelmson, and in other instances Gray, for the United" (Brief, p. 5).

The inconsistency of this criticism on the part of appellant is further made plain by his admission on page 11 of his reply brief, where, when speaking of the extra work for which his "experts" made allowances, he says:

> "But this was evidently work *which was uncovered in the doing of the specification work,* and although it amounted to considerable in the aggregate, it was comparatively insignificant in the

detail (with the exception of the tank top work), and *we surmise* it was not thought of sufficient importance, as each item was discovered, to call for a special price."

We think in the foregoing, appellant's challenge to us to point out particular items, is fully covered.

CRITICISM OF OUR REPLY TO THE CLAIMS OF ERROR IN THEIR APPENDIX NO. 1.

We despair of making any headway with parties, who, after reading our brief with the minute attention to detail that the reply brief indicates, make the assertion that our declaration of intention to show how "palpably unfounded those objections are, never took any more definite shape than a reference to certain parts of the record as a complete answer," and then refer to the *last heading* of our Appendix No. 2 (p. 79) as containing *all* that was said upon that subject, and who *ignore the rest of said Appendix No. 2* (pp. 61-79), as well as that part of the body of the brief itself which treats of the same subject, namely, pages 119 et seq. and page 130.

CRITICISM AS FOLLOWS (Reply Brief, p. 8):

> *"At the top of page 6 it is asserted that the contention of appellant is, that it was to receive a credit from the upset price of the contract if the crank-shaft was not removed, and that* THIS CONTENTION *is denied by the United."*

That is not the statement of our brief at all. In making that suggestion appellant entirely ignores the controlling elements in the statement he criticises, namely:

> *"And in other respects the upset price was to govern."*

That is what the United denies, and we think we have made it perfectly plain throughout the record, as well as throughout our brief, that our contention has always been that "the upset price was to govern" *only* in case the work was done *"in strict accordance with the specifications"*.

CRITICISM OF THE STATEMENT THAT AT THE TIME OF A TENDER OF A CHECK FOR $15,500, CAPTAIN MATSON HAD NOT SEEN THE BILLS, NOR DID HE KNOW ANYTHING ABOUT THE FACTS (Reply Brief, p. 13):

Counsel says that he is unable to verify this statement by the record. We think the reference on page 8 of our statement of facts fully bears it out. However, we might add thereto the fact that the telegram in question was dated November 26th (p. 1751) and that Captain Matson himself testifies that he first began to look into the bill as soon as he came back from Newport News, which was December 10th, and that he then commenced to look into the bill, and does not think he had the bills in the office until a long time after that. That he knows it was a long time before he got the bill (pp. 1716-17-18), and when pressed with the fact that the bills had been presented a long time before that date, he says:

> "Well, they got in there then *between the time I left and when I came back*" (p. 1718).

RENEWED ATTEMPT, BY THE DUAL USE OF THE WORD "TIME-KEEPER" TO SUGGEST THAT SJOBERG WAS A TIME-KEEPER IN THE SENSE THAT PUTZAR WAS A TIME-KEEPER, INSTEAD OF A CLERK IN THE OFFICE, WHO MERELY RECORDED THE TIME AFTER IT WAS CHECKED UP AND CERTIFIED TO AS CORRECT BY THE FOREMAN ON EACH PARTICULAR JOB.

We only desire to point out the repetition of this contention. There is no dispute that Mr. Adamson kept the time in the shop; that his position was created absolutely for the purpose of keeping the proper time on the separate jobs as they came in the shops, and checked off the time that was put on each job. Neither can there be any dispute that Taylor, the foreman in his department, and Siverson, foreman in his department, performed the same office each day. The testimony is undisputed on this point. See also Dolan, Nelson and Allen (pp. 501, 124, 1030, 1031, 1125, 1186).

As to Sjoberg being a clerk, Dolan says, page 154:

"Q. In what respect is he a time-keeper?
A. I take my tickets and give them to him.
Q. Is he the man that does the clerical work after the time tickets are turned in to him?
A. Yes.
Q. He does not oversee the work of the men?
A. No, sir.
Q. He has charge of the time cards when they come into the office?
A. Yes, sir.
Q. And that is what you call a time-keeper?
A. Yes."

See also Curtis, page 1427.

THAT PUTZAR KEPT AN INDEPENDENT TIME-BOOK IS NOT DISPUTED.

We are asked where we find support in the record for this assertion.

There is no one who directly testifies that he did *not* keep a handbook, while Curtis and Kinsman directly testify that he *did* have such a book (V, pp. 1872-73; V, p. 1517).

The first of these references is also contained in our original brief.

That, in the face of this undisputed record, appellant should claim the contrary "is the very *crux*" of his contention, does not help the matter. We are not sure whether or no, by the use of that term, he means that his contention is a "conundrum", or that it has become his "cross", for they both are the dictionary definitions of the word.

CRITICISM OF OUR STATEMENT THAT THERE WAS ALSO SOME NIGHT WORK AFTER MR. PUTZAR WAS APPOINTED ENGINEER, DURING WHICH TIME IT IS CONCEDED HE WAS ON BOARD (Reply Brief, p. 76).

Appellant says:

> "We emphatically deny any such concession, and ask that counsel substantiate the statement from the record, if he can, etc."

Saunders testifies that Putzar was appointed *chief engineer a week before she went out* (p. 1777). Is the denial of the alleged concession that "he was on board", intended to suggest that he was not attending to his duty as chief engineer?

THE CONTRACT AN ENTIRETY.

In his attempt to controvert our claim that the contract is an entirety, appellant addresses himself to a criticism of our statement that the specifications "contained 15 items, most of which are interlocking work upon an engine". He then attempts to prove that these 15 items of the specifications do not interlock, one with another.

While we take direct issue with him upon that suggestion, nevertheless, whether they interlock or no is not the material point. "*The contract price*" does "interlock", if we may use that expression. In other words, there is a single price fixed for the entire work called for by the 15 specifications, but the contract furnishes no rule to determine the value of the work to be done under any particular item, and the contract, to use the language of the Court in LINCOLN v. SCHWARTZ, "furnished no rule to determine the value of any specific portion of the work", or, as said in PITCAIRN v. PHILLIPPS Co.,

> "The contract itself did not attempt to apportion this sum among various items, and there was, therefore, no basis for such an appropriation, if otherwise it could have been appropriately made. The contract being entire, the price to be paid is single, and the consideration is absolutely for the performance of the whole work contracted to be performed."

And again, as it is said in ROUNDS v. AIKEN MFG. Co.,

> "The gross sum $53,198 is contracted for by them in payment for all their work and materials they should furnish in building the mill under their bid in writing. This being a sum in gross, how could any one determine what particular price (piece) of the work or material in said mill building would cost?"

Appellant's attempt to distinguish these cases, absolutely ignores the point thus made.

The foregoing is a complete answer to appellant's criticism about the entirety of the contract. Nevertheless, most of the *work* itself *is* interlocking, and the mere fact that it is stated in separate items, does not in anywise affect the proposition. All of the work on the engine required a dismantling of the engine and shafts, before the detail of any part thereof called for in the different items of the specification could be begun.

The closing paragraph under this heading (appellant's reply brief p. 26) is not a fair statement of our contention. We do not claim that *because a certain item was omitted we can charge a greater price on that account.* We do not say that because one of the 15 items is left out we can charge more for the other 14 items. What we do say is, that our figure of $11,749 was made upon the assumption that the work should be done in strict accordance with the specifications, and if not so done, that appellant should pay on a *quantum meruit,* instead of a fixed price. If a single item were *omitted,* presumably the *quantum meruit* would be less than the fixed price. *But in this case it is not a question of having simply omitted one item.* There was not only an omission, but there were "changes, modifications and *additions*" so that the work actually done entailed more labor and materials than that called for by the specifications. If, therefore, on a *quantum meruit* it should cost more than the original bid, that result is not due to the *omission* of one item of the specifications, but is due to the *addition* to many other items of the specifications.

OUR CALLING OTHER WITNESSES TO TESTIFY DIRECTLY TO SOME OF THE CARDS TESTIFIED TO BY ADAMSON.

Under this heading it is suggested that we only called 15 extra witnesses out of a possible 31 (p. 65).

The fact that the others were absent, or dead, is in this connection ignored, and the fact that their cards were proven by proving their handwriting is also ignored. Our contention of the competency of such proof of the cards, under the rule laid down in the case of WISCONSIN STEEL CO. v. MARYLAND ETC. CO., quoted in our brief at pages 133-34, must not be lost sight of.

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ADMISSIBILITY OF PUTZAR'S SHEETS AND TIME CARDS.
DOES THE STATE LAW OF EVIDENCE APPLY?
WHAT IS THE RULE OF EVIDENCE IN A COURT OF ADMIRALTY?

Appellant has seen fit to attempt to import into this proceeding the section of the Code of Civil Procedure of the State of California as applied to the admission of evidence. We will give that subject a few moments' attention.

In support of this contention, Sec. 721 of the Revised Statutes is cited. Appellant, however, overlooks the fact that the very language of the statute limits its application to *"trials at common law"*. Commenting upon this fact, the Supreme Court in the case of Bucher v. Cheshire R. Co., 125 U. S. 582, said:

> "The language of the statute limits its application to cases of trials at common law. There is, therefore, nothing in the section which requires it to be applied to proceedings in equity or in admiralty; nor is it applicable to criminal offenses against the United States."

It would have been more to the purpose if appellant had referred to the fact that, in matters of evidence, so far is a *Court of Admiralty* from being controlled by the State statutes, that it is a settled rule in such Courts that not only are they not bound by the rules of evidence which are applied in Courts of common law, *but they may, where justice requires it, take notice of matters not strictly proved and may receive in evidence testimony which might not be admissible in other Courts.*

In The J. F. Spencer, 3 Bened. 337, it is said:

> "Were this a proceeding at common law, those copies could not be received in evidence for any purpose. If they were copies of documents on file in the office of the American Consul, they would be admissible under the Act of January 8th, 1869 (15 Stat. 266). Being from the office of the British Consul, they are not made evidence by any statute. Nevertheless, I am of the opinion that they are admissible in a court of admiralty. Courts of admiralty are not bound by all the rules of evidence which are applied in the courts of common law, and they may, where justice requires it, take notice of matters not strictly proved. Thus, Dr. Lushington says, in the case of The Peerless, 1 Lush. 41: 'This court has, both in prize matters and in civil suits, been accustomed to receive evidence which would not have been admitted in other courts. For instance, affidavits sworn almost in every way, before justices of the peace, commissioners in chancery, etc., even evidence not on oath, as where, according to the custom of some of the states in the north of Europe, the original evidence was not taken on oath, but the person giving it undertook to make oath afterwards, if required. So, from the necessity of the case, all parties interested were, contrary to the laws of other courts at the time, admitted to give evidence in cases of collision, salvage, and others.'"

See, also, The Boskenna Bay, 22 Fed. 667.

The rule thus announced, fits in very well with and as an extension of the common law rule announced in Wisconsin Steel Co. v. Maryland Steel Co. cited in our original brief, which recognizes a relaxation of the hearsay rule in cases of practical necessity arising in large mercantile and manufacturing businesses, where the transaction has been participated in

by numerous employees. Having in view the difficulties attending the making of exact proof under such circumstances, the nature of the defense in this case emphasizes the justice of the rule which requires the Court to take notice of matters not strictly proved, under the power thus resting in a Court of Admiralty.

In this connection we take occasion to remark that, through what appears to be a lack of familiarity with the principles which have given the admiralty its distinctive claim to be a Court of "justice", as distinguished from a mere Court of law, those principles seem in recent days frequently to be lost sight of, to the permanent injury of the administration of justice.

OUR EVIDENCE AS COMPARED WITH EXPERT EVIDENCE.

Appellant again lays stress upon the value of the testimony of his experts, as against the showing that we made from our records. Sufficient has been said in our original brief upon this subject, but we cannot refrain from adding at this point a quotation from the decision of the Supreme Court in a similar case, indicating its view of the relative value of these two kinds of evidence.

In SIMPSON v. BAKER, 2 Black. 581, this appears (our italics):

> "The libelant proved his demand for work and materials furnished by the books and accounts kept by his clerks, and the court may well have considered this better evidence than the opinions of experts, *taken ex parte to undervalue the work and count the treenails after the sheeting was replaced and the repairs covered with paint.*"

How thoroughly in accord is this suggestion of the Supreme Court with our criticism of the testimony of the experts in this case.

PRESUMPTION ARISING FROM THE FINDINGS OF THE TRIAL COURT.

Under this head, appellant takes us to task for stating that "there exists the presumption arising from the findings of the District Court" against "appellant's statement of 'facts of the case' which are rather a statement of some of its *contentions*". This he calls "Counsel's *pretended* conception of the law relative thereto".

Though we are not conscious of having made "*frequent*" reference to these "presumptions", we stand ready to defend the statement before referred to, notwithstanding that it is suggested that our doing so "must be looked upon with no little surprise". We are fully advised that there is a difference in this respect between a cause where the lower Court has seen the witnesses, and one where the testimony is taken before a commissioner, but to say that in the latter case there is absolutely no presumption in favor of the correctness of the decision is stretching the rule beyond the limits of common sense. This Court has, at least inferentially, recognized this fact in the case of The Joseph B. Thomas, 86 Fed. 660, when it used the following language:

> "The conclusions of the trial court upon disputed questions of fact, where the witnesses were present at the trial are, as a general rule, accepted by the appellate court. (Citing cases.) But the reason in favor of that rule does not exist, and cannot be applied *(at least, not to the same extent)*, in a case like the present, where all of the testimony was taken before an examiner."

The parentheses are the Court's but the italics are our own.

So, also, in the case of PERRIAM v. PACIFIC COAST CO., 133 Fed. 144, this Court was reviewing a case where the testimony was taken *before a commissioner* and reported to the Court, and speaking of the findings of the District Court, this Court said:

> "On reading the voluminous and conflicting evidence in the record, we are not convinced that these conclusions were erroneous. The general rule is well established, and has been repeatedly affirmed by this and other courts, that the findings of fact of the trial court in an admiralty case, made upon conflicting testimony, will not be disturbed on appeal, unless they are found to be clearly against the weight of the evidence."

Aside, however, from the foregoing suggestions, it is a settled principle applying to all Courts, admiralty or common law, that there is a presumption that the Court has done its duty, and done it correctly. This principle is elementary and requires no special citation of authority.

Moreover, in the present case the District Court had the same record before it as this Court has, and was in the same position as this Court is, to pass upon the facts. If the fact that the witnesses were not before it, deprives its decision of any presumption of correctness, then the same rule must apply to the decision made in the appellate Court, notwithstanding it is a trial *de novo*.

This Court, therefore, starts with the presumption that the findings of the trial Court are correct, though

upon the examination of the record, the appellate Court may conclude that the judgment was erroneous. *Prima facie the judgment is right.*

When we start, therefore, with the presumption that appellant's contentions are unfounded, we are *not* laying ourselves open to the charge of attempting to mislead the Court by "pretending" that the law is different from what it in fact is. Our chief purpose in the foregoing is to combat the suggestion that we are presenting to this Court a suggestion in which we ourselves have no faith.

Respectfully submitted,

NATHAN H. FRANK,

IRVING H. FRANK,

Proctors for Appellee.